EX PARTE OR LATE FILED

ORIGINAL

LAW OFFICES
LEVENTHAL, SENTER & LERMAN P.L.L.C.
SUITE 600
2000 K STREET, N.W.
WASHINGTON, D.C. 20006-1809

NORMAN P. LEVENTHAL
MEREDITH S. SENTER, JR.
STEVEN ALMAN LERMAN
RAUL R. RODRIGUEZ
DENNIS P. CORBETT
BRIAN M. MADDEN
BARBARA K. GARDNER
STEPHEN D. BARUCH
SALLY A. BUCKMAN
NANCY L. WOLF
DAVID S. KEIR
DEBORAH R. COLEMAN
NANCY A. ORY
WALTER P. JACOB
LINDA D. FELDMANN
RENÉE L. ROLAND
ROSS G. GREENBERG
JOHN D. POUTASSE
MATTHEW H. BRENNER
CHRISTOPHER J. SOVA

TELEPHONE
(202) 429-8970

TELECOPIER
(202) 293-7783

WWW.LSL-LAW.COM

WRITER'S DIRECT DIAL
202-416-6755

WRITER'S DIRECT FAX
202-429-4603

WRITER'S E-MAIL
BGARDNER@LSL-LAW.COM

September 22, 1998

ORIGINAL

RECEIVED

SEP 22 1998

Federal Communications Commission
Office of Secretary

BY HAND

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Written Ex Parte Presentation
MM Docket No. 93-25

Dear Ms. Salas:

As a follow-up to oral presentations reported to you on August 19, 1998, Noggin, a children's educational programming channel that is a joint venture of Children's Television Workshop ("CTW") and Nickelodeon, hereby submits the following discussion of what entities should qualify to utilize the DBS channel capacity reserved for noncommercial educational programming under Section 25(b)(3) of the 1992 Cable Act (47 U.S.C. § 335(b)(3)). The purpose of this presentation is to further demonstrate that joint ventures of non-profit and for-profit entities created to produce educational programming should qualify as "national educational programming suppliers" if the non-profit venturer (i) is organized for educational purposes, and (ii) holds either positive or negative control over the venture, including its personnel, programming, and finances.

114401/092298/12:26

No. of Copies rec'd 0+1
List ABCDE

I. If Access to the DBS Capacity Set Aside for Noncommercial Educational Programming is Strictly Limited to "Pure" Non-Profit Entities, the Statutory Intent Will Not Be Fulfilled.

The statute requires that DBS providers meet the requirement to set aside capacity "exclusively for noncommercial programming of an educational or informational nature" "by making channel capacity available to national educational programming suppliers," a term that "includes any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions."[1]

Of these three types of eligible entities, the first two — noncommercial educational television stations and other public telecommunications entities — are entities designated in the Corporation for Public Broadcasting's enabling statute as intended recipients of federal funds to produce and/or acquire high quality educational, cultural and informational programming for dissemination to the public.[2] As defined in that statute, both types of enterprises must be either publicly-owned or non-profit entities.[3]

Although it is thus clear that non-profit programmers are intended beneficiaries of the setaside capacity, there is no legal, factual or policy basis for excluding from the setaside programmers positively or negatively controlled by such not-for-profit programmers, if the mission and structure of the controlled entities assure that in creating educational programming, they will serve the statutory goals exactly as their non-profit "parents" do.[4]

---

[1] 47 U.S.C. §§ 335(b)(1), (b)(3), (b)(5)(B).

[2] 47 U.S.C. §§ 396(a)(1), (g)(1)(A), (g)(2)(B), (k)(3)(B)(i), 397(6), (7), (12), (14).

[3] U.S.C. § 397(6), (7), (12).

[4] The statute, on its face, does not limit qualified programmers to non-profit entities. If Congress had intended that only such entities should be able to utilize the setaside, it could have said so. Indeed, as noted below, the statute uses the term "non-profit" only with respect to the fee structure for carriage on the DBS setaside.

Moreover, the statute states that "[t]he term 'national educational programmer supplier'

(continued...)

As the D.C. Circuit has explained, the statute's primary purpose is to benefit *viewers* by assuring the availability of noncommercial programming, particularly educational and cultural programming for which production and distribution opportunities may be limited due to commercial pressures. *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 976 (D.C. Cir. 1996) (affirming constitutionality of the DBS reservation for noncommercial educational and informational programming).

---

[4](...continued)
includes" three specific types of enterprises, thereby suggesting that *other* types of entities, namely, those who are similar in mission and function to the three enumerated types, may also qualify. Indeed, in the 1993 *NPRM* in this proceeding, the Commission itself said that it was "of the view that this term would encompass...[other] entities...which disseminate programming on a national basis to public television stations," and sought comments on "[w]hat other entities should be included." *NPRM*, 8 FCC Rcd 1589, 1597 (1993).

Finally, the statutory requirement that in determining reasonable prices for access to the setaside, the FCC "shall take into account the nonprofit character of the programming provider and any Federal funds used to support such programming," 47 U.S.C. § 335(b)(4)(A), also does not limit eligible entities to non-profits. As the *NPRM* points out, "With respect to the issue of nonprofit character and receipt of federal funding, the statute only states that this should be taken into account in any rate determination. Does this language mean that such characteristics should entitle some individual programmers to an even lower rate than 50% of the direct costs of the provider...?" *Id.* at 1598. In other words, the *NPRM* itself acknowledges that *varying levels of nonprofit involvement* could exist, resulting in a sliding scale for carriage fees.

And today, precisely because of such economic pressures, most high-quality educational programming created for children by non-profit entities is actually produced by co-ventures formed by these entities and for-profit businesses. A few current examples of such ventures are:

Program	Non-Profit Venturer	For-Profit Venturer
"New Ghostwriter Mysteries"	Children's Television Workshop ("CTW")	CBS
"Dragon Tales" (for PBS)	CTW	Columbia Tri-Star Domestic Television
"Arthur"	WGBH	Cynar
"Puzzle Place"	KCET	Lancit Media
"Reading Rainbow"	WNED/GPN	Lancit Media
"Between the Lions"	WGBH	Serius
"Bill Nye the Science Guy"	KCTS	Buena Vista Domestic Television

Moreover, the Corporation for Public Broadcasting ("CPB") regularly funds such non-profit/for-profit co-ventures. Indeed, it is instructive that CPB, whose mandate to further noncommercial educational and cultural programming[5] is remarkably akin to the purpose of the DBS setaside provision of the 1992 Cable Act — to "assur[e] public access to diverse sources of information by requiring DBS operators to reserve four to seven percent of their channel capacity

[5] 47 U.S.C. §§ 396(a)(1), (a)(5), (g)(1) (CPB is established to facilitate use of public broadcasting and "public telecommunications services" for educational and cultural purposes, including programming expressing diversity and excellence); 47 U.S.C. § 397(14) (term "public telecommunications services" means noncommercial educational and cultural radio and television programs and related instructional or informational material).

for noncommercial educational and informational programming"[6] — has been directed by Congress to fulfill its mission in part by providing funding to "independent producers and production entities" — *which can and do include for-profit enterprises.*[7] Given this Congressional recognition that such entities should participate in the process of creating noncommercial educational programming, the Commission, in implementing a statute found by the D.C. Circuit to "represent[ ] nothing more than a new application of a well-settled government policy of ensuring public access to noncommercial programming,"[8] should not altogether bar participation of a for-profit in the DBS setaside, so long as a not-for-profit controls the venture.

As suggested by the foregoing list of non-profit/for-profit ventures created to produce educational programming, non-profits more and more seek the involvement of for-profit partners to help share the high production costs of quality programming, and to ensure wide-spread distribution of the completed programs. In such partnerships, the non-profit may contribute intellectual property, educational research, production know-how, and funds, while the for-profit contributes such assets as funds and its own distribution infrastructure, thereby creating the synergies for a viable co-venture. In other instances, the for-profit may contribute production services, such as animation, to reduce production costs and make the project economically viable.

Co-ventures for production and distribution of an educational children's program series typically do not create a free-standing business entity to implement the co-production, relying instead on a contractual arrangement. But where a 24-hour, seven-day noncommercial channel intended as an ongoing business enterprise is envisioned (such as Noggin), as opposed to a single co-produced program series, a separate organizational entity will, as a practical necessity, be created to operate the venture. In this circumstance, where a non-profit, tax-exempt organization forms a joint venture entity with a for-profit co-venturer, *the new entity* ***must*** *utilize*

---

[6] *Time Warner Entertainment Co. v. FCC*, 93 F.3d at 976.

[7] 47 U.S.C. §§ 396(g)(2)(B), (k)(3)(B)(i). *See also* www. cpb.org: "Program Funding Initiative — General Information: Eligibility. Eligible applicants include, but are not limited to, independent producers, public television stations and organizations, educators, and developers of new media."

[8] *Time Warner Entertainment Co. v. FCC*, 93 F.3d at 976.

a non-tax-exempt corporate form, since exempt organizations cannot as a legal matter be owned in whole or in part by private entities who will derive earnings from the organization. Specifically, to qualify for tax-exempt status under federal tax law, "no part of the net earnings" of a charitable or educational corporation may "inure[ ] to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(3); *see also* IRS Reg. § 1.501(c)(3). Thus, Noggin could not, under the federal tax code and corresponding IRS regulations, have been created as an exempt organization, since it is owned in part by a for-profit company.

If the Commission were to adopt a reading of 47 U.S.C. § 335(b)(3) that *per se* made joint-venture or partnership entities entered into by for-profits and non-profits to operate educational channels ineligible for the setaside, then it would be creating an irreconcilable anomaly: educational children's programming (much of it widely acclaimed for its core educational value) co-produced by non-profit and for-profit organizations that *do not* create a separate legal entity to carry out the production would be eligible for the setaside, while the same organizations would be ineligible for the setaside if they *do* create such an entity. The inconsistent result cannot be justified by either the language of the statute or the public policy objectives it was meant to fulfill.

Without Nickelodeon's program library, distribution infrastructure, and cash, CTW could not have undertaken the creation of an entire channel devoted to noncommercial children's educational programming. In fact, given that substantial amounts of noncommercial programming today are co-produced by non-profits and for-profits, it is doubtful whether more than a very few non-profits creating quality educational and informational programming will qualify to use the DBS setaside if the Commission restricts its use to "pure" non-profit entities. Such a restriction is at odds with the statutory mandate to make noncommercial educational programming more widely available through the DBS medium.

We are not, however, urging that Congress' mandate should be implemented simply by opening up the setaside to commercial-free educational programming supplied by any type of programmer, including strictly for-profit entities or their wholly-controlled subsidiaries. Instead, as detailed below, the Commission should deem an entity qualified for the setaside only if it is either a non-profit enterprise organized primarily for educational purposes, or a joint venture or similar entity also organized with an educational purpose and negatively or positively controlled by such a non-profit.

II. Educational Joint Ventures between For-Profit Entities and Not-for-Profit Educational Entities that Positively or Negatively Control the Venture, such as Noggin, Should Qualify for the Setaside.

The three examples of "national educational programming suppliers" contained in the statute share a mandatory characteristic: an educational mission. Noncommercial educational television stations must be operated to advance an educational purpose (47 U.S.C. §§ 397(6), (12); 47 C.F.R. § 73.621(a)); "other public telecommunications entities" are enterprises organized primarily to disseminate educational and cultural programs to the public by non-broadcast means (47 U.S.C. § 397(7), (12)); and "public or private educational institutions" are institutions chartered to perform educational and instructional services. In addition, most such entities are not-for-profit enterprises, either by definition (as noted above) or by choice. *Thus, not-for-profit programmers with a primarily educational mission are those whom Congress clearly expected would best implement the statutory objective of providing "noncommercial programming of an educational or informational nature" to DBS customers.*

It follows, then, that where a non-profit programmer (i) qualifies as a tax-exempt organization under federal law by virtue of being a corporation or foundation "organized and operated exclusively for...educational purposes" (26 U.S.C. § 501(c)(3)), and (ii) legally and actually controls another entity, and particularly its educational purpose, then "noncommercial programming of an educational or informational nature" produced and distributed by the controlled entity should qualify for the setaside, even if the controlled entity is itself not a tax-exempt organization. As is now shown, CTW, an exempt organization operated exclusively for educational purposes, controls Noggin and its educational purpose sufficiently to qualify Noggin for the setaside.

A. Just as CTW is Operated for Educational Purposes Only, Noggin's Educational Nature is the Essence of the Joint Venture.

As noted, CTW is a non-profit organization operated for educational purposes. Similarly, Noggin, although necessarily a for-profit enterprise (as explained above), under the terms of the CTW/Nickelodeon Joint Venture is "a children's educational programming television service...primarily dedicated to educating and entertaining children two years of age through fifteen years of age." Among Noggin's "key objectives" are "helping children to learn and to acquire a love of and respect for learning by providing educational and entertaining programming that enhances the intellectual, cognitive, emotional, moral and/or social

development of kids." To fulfill this mission, the libraries of more than a dozen acclaimed educational program series separately produced by CTW and Nickelodeon (such as "Sesame Street" and "Blue's Clues") are being licensed to Noggin.

Moreover, Noggin's educational mission is virtually immutable. No matter what the two partners' respective equity interests in the venture may become, a unanimous vote is required (i) before Noggin's Mission Statement incorporating its educational purpose can be changed; (ii) before Noggin can engage in a business contrary to the Mission Statement; or (iii) before Noggin's standards and practices, including its non-commercialization policy, can be altered.

Thus, Noggin shares with CTW a purpose of creating and distributing noncommercial video programming that will enhance the education of American children — the same objective that characterizes the "national educational programming suppliers" named in the statute.

B. CTW, an Entity that Itself Qualifies as a "National Educational Programming Supplier," Exercises Negative Control over Noggin.

The Commission is often called upon to determine the locus of "control" of an entity, most often in the context of Section 310(d) of the Communications Act, which requires prior Commission approval of the "transfer of control" of any entity holding a "radio" (including, but not limited to, broadcast radio and television) permit or license. While the 310(d) context is not directly on point with the issue here — whether a non-profit entity controls a programmer seeking to qualify for the DBS setaside — the case law and policies that have grown out of this context provide a useful and appropriate template for evaluating the control of such a qualifying programmer under Section 25(b)(3) of the 1992 Cable Act. What follows, then, is a discussion of Commission precedent governing the question of who controls a permittee or licensee of a facility and how that body of law can be utilized in concluding whether a joint venture, such as Noggin, entered into by a not-for-profit entity and a for-profit entity, is controlled by the not-for-profit entity.

1. What Is Control?

A "realistic definition" of control, the Commission has stated, "includes any act which vests in a new entity or individual the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue." Powell Crosley, Jr., 11 FCC 3, 20 (1945). That definition encompasses "every form of control, actual or legal, direct or indirect, *negative* or affirmative." Rochester Tel. Corp. v. United States, 23 F. Supp. 634, 636 (W.D.N.Y. 1938), aff'd, 307 U.S. 125 (1939)(emphasis added.).

The Commission traditionally analyzes both *de jure* control and *de facto* control. *De jure* control is control as a matter of law, such as a shareholder with 50% or more of the voting stock of a corporation. The Commission also recognizes "negative" control as a form of *de jure* control.[9] Thus, a party who owns exactly 50% of an entity's voting stock holds negative control. And where two parties each own exactly 50% of an entity's voting stock, each is said to hold negative control. With negative control, a party can block decisions affecting every aspect of an entity's activities, but cannot compel action without the concurrence of the party with whom it shares control.

A party may also control an entity without holding *de jure* control. Such a party is said to hold *de facto* control, or control in fact. Although determining who possesses *de jure* control is a straightforward exercise, the test for *de facto* control is more complex and involves no formula. Rather, the Commission looks to the shareholder's "power to dominate the management of corporate affairs," Benjamin L. Dubb, 16 FCC 274, 289 (1951), including the ability to select the members of an entity's board of directors, Metromedia, Inc., 98 FCC 2d 300, 303, reconsideration denied, 56 RR 2d 1198 (1984), appeal dismissed sub nom. California Association of the Physically Handicapped v. FCC, 778 F.2d 823 (D.C. Cir. 1985), and the ability to direct the entity's programming, personnel and finances, see, e.g., Stereo Broadcasters, Inc., 87 FCC 2d 87 (1981), reconsideration denied, 50 RR 2d 1346 (1982).[10]

---

[9] As is true with the acquisition or relinquishment of positive control of its permittees and licensees, the Commission requires prior approval of the acquisition or relinquishment of negative control. See Albert J. Feyl, 15 FCC 823, 825-26 (1951).

[10] In assessing the locus of control of the permittee or licensee of a cellular telephone facility, the Commission relies on the six-part test enunciated in Intermountain Microwave,

(continued...)

2. Applying Commission Case Law, CTW, A Non-Profit Entity, Holds (Negative) De Jure and De Facto Control of Noggin.

Noggin is a free-standing, for-profit entity organized in the form of a Delaware limited liability company (LLC). Under the terms of the LLC, both CTW and Nickelodeon are committed to the venture for a minimum of five years. Noggin is truly a 50/50 joint venture in that CTW and Nickelodeon each owns half of the equity and each holds an equal vote on the Management Committee, which governs Noggin. Because each holds an equal vote, each of CTW and Nickelodeon possesses negative *de jure* control of Noggin.[11]

As for who *in fact* controls Noggin, the answer is that CTW and Nickelodeon *together* "dominate the management of corporate affairs," as required under Benjamin L. Dubb, CTW and Nickelodeon *together* select the members of the Management Committee (the equivalent of a corporate board of directors), as required under Metromedia, and CTW and Nickelodeon *together* are able to direct Noggin's programming, personnel and finances, as required under Stereo Broadcasters. Specifically, as to management of corporate affairs, the terms of the Noggin joint venture provide that Noggin is governed by the Management Committee, in which CTW and Nickelodeon have an equal vote. Any approval by the Management Committee requires a unanimous vote, unless otherwise specifically agreed. The number of representatives on the Management Committee is determined by both CTW and Nickelodeon. According to the terms of the joint venture, Noggin's CEO and any successor is appointed by the Management Committee, and can be removed only with the approval of the Management Committee. Additionally, the Management Committee must approve extensions or renewals of any employment contract of the CEO or his successor.

---

[10](...continued)
24 RR 983 (1963). However, that test does not query control with respect to programming, a central concern with respect to the DBS setaside issue. Accordingly, the *ad hoc* test described above is used here in lieu of the Intermountain test.

[11] Although the LLC terms allow Nickelodeon to acquire an additional 1% of equity from CTW within the first year after the end of the venture's first break-even year, the 49/51 equity split will not modify the 50/50 voting share.

With respect to directing Noggin's programming, personnel and finances, the terms of the joint venture clearly provide that CTW and Nickelodeon together will hold tight reins over each of these areas of operation.

Programming: Noggin's purpose is to "develop, operate, manage, own, distribute, market and perform all functions attendant to a children's educational television programming service. . . ." Further, as stated above, according to the joint venture's statement of purpose, Noggin has among its key objectives "helping children to learn and to acquire a love of and respect for learning by providing educational and entertaining programming that enhances the intellectual, cognitive, emotional, moral and/or social development of kids."

To that end, CTW and Nickelodeon have agreed to create a "creative council," which is composed of an equal number of representatives of CTW and Nickelodeon, that will act in a consultative role with Noggin's CEO as necessary or advisable with respect to creative and branding issues affecting Noggin. The creative council is to serve as a "communications channel" to the partners with respect to such issues.

Further, in the area of programming, while the day-to-day operations of Noggin are governed by the CEO and his management team, to whom most operational decisions will be delegated, there are enumerated extraordinary matters which require the unanimous approval of the Management Committee. Such extraordinary matters relating to programming include: engagement of Noggin in a business at odds with its Mission Statement; other actions at odds with the Mission Statement; and modifications or changes in Noggin's standards and practices, including its advertising and promotional policy.

The terms of the Noggin joint venture ensure that no programming or other creative decisions will be made without the shared control of CTW and Nickelodeon — even during the period preceding the January 1, 1999 launch of Noggin. The joint venture provides that until that time, both CTW and Nickelodeon will assign their own employees to a "launch team." This team will have, but only subject to the approval of the Management Committee, significant autonomy to formulate and begin implementation of the creative and business aspects of Noggin. The joint venture terms expressly state that the launch team will draw heavily on the "appropriate expertise of both partners as needed." Launch team duties include implementing the programming schedule, network standards and practices and program acquisition plans.

It is worth repeating that 50/50 control over programming is so essential to both CTW and Nickelodeon that the terms of the joint venture provide that even if the equity of one party falls below 25%, that party still retains negative control over three crucial programming issues: (1) the content of Noggin's Mission Statement; (2) the engagement of Noggin in a business contrary to, or at odds with, the Mission Statement; and (3) a modification or change in Noggin's standards and practices, including Noggin's advertising and promotional policy.

Personnel: Noggin's day-to-day operations are delegated to the CEO and his management team. While the terms of the Noggin joint venture permit the CEO — who is appointed by the Management Committee — to select his own management team, he may do so only subject to the approval of the Management Committee. Thus, Noggin's chief programming officer and financial manager cannot be hired without the unanimous consent of the Management Committee, whose vote is shared equally by CTW and Nickelodeon.[12]

Finances: Under the terms of the Noggin joint venture, Noggin's annual budget for any fiscal year must be submitted for approval by the CEO to the Management Committee. In the interim, pursuant to the joint venture terms, Noggin's financial manager will be required to provide CTW and Nickelodeon on a regular and ongoing basis with detailed financial reports, including monthly closing reports in line item detail (with variances and explanations for variances), revised full year estimates on a monthly and quarterly basis with line item detail (with variances and explanations for variance), as well as other monthly or quarterly reports as determined by CTW and Nickelodeon.

In view of the above, it is clear that Noggin is a joint venture that is closely supervised and tightly controlled by CTW and Nickelodeon on an equal basis. The 50/50 equity contributions also demonstrate the *bona fides* of the equality of the partners in the Noggin venture. Indeed, both parties come to the venture with extensive experience in the field of children's programming and are determined to pool their libraries and knowledge to create a

---

[12] Under the terms of the Noggin joint venture, Nickelodeon does have the power to unilaterally remove the chief programming officer, provided such decision is in good faith and in the reasonable best interest of Noggin, and "only after meaningful consultation with CTW and the CEO." This provision should not be viewed as endowing Nickelodeon with more control, in that the successor to any chief programming officer may be hired only subject to the approval of the full Management Committee.

high-quality, commercial-free educational children's program service. Because of the strong children's backgrounds each brings to the venture and the strong-willed nature of each, CTW and Nickelodeon negotiated for nearly a year to produce a joint venture that provides for equal shares in the top-to-bottom management of Noggin, from crafting the Mission Statement, to consulting on programming matters, to hiring management, to overseeing finances.

* * * * * * * * * *

Accordingly, Noggin, as an entity with an educational purpose that is negatively controlled by a not-for-profit educational programmer, should be deemed to qualify for the DBS setaside.

Respectfully submitted,

Barbara K. Gardner

Barbara K. Gardner

cc (by hand delivery):
Rebecca Arbogast, International Bureau
Rick Chessen, Office of Commissioner Tristani
Rosalee Chiara, International Bureau
Ari Fitzgerald, Office of Chairman Kennard
Susan Fox, Office of Chairman Kennard
Eloise Gore, Cable Services Bureau
Meryl S. Icove, Cable Services Bureau
Joel Kaufman, Office of the General Counsel
Regina Keeney, International Bureau
Jane Mago, Office of Commissioner Powell
Maryanne McCormick, International Bureau
Marilyn Sonn, Office of the General Counsel
J.T. Taylor, International Bureau
Helgi Walker, Office of Commissioner Furchtgott-Roth
Anita Wallgren, Office of Commissioner Ness